88 No. 1626

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

_____ Term, 1989

DEXTER R. SAMS, - - - - - Petitioner,

versus

UNITED STATES OF AMERICA, - - Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER WITH APPENDIX

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The Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit rendered on November 25, 1988.

QUESTIONS PRESENTED FOR REVIEW

Did the decision by the United States Court of Appeals for the Sixth Circuit erroneously decide that an indictment was not barred by the six year statute of limitations set forth in Section 6531 in 26 U.S.C. where the indictment was returned on November 19, 1986 and more than six years after April 15, 1979, where it charged the Petitioner with willfully failing to pay his income taxes for the calendar year of 1979.

PARTIES TO THE PROCEEDING

All the parties to this proceeding are set forth in the caption to the case before this Court.

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No.

SUPREME COURT OF THE UNITED STATES

_____ Term, 1989

DEXTER R. SAMS, - - - - *Petitioner,*

v.

UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER WITH APPENDIX

REFERENCE TO OPINIONS

Decision herein by the United States Court of Appeals for the Sixth Circuit was filed on November 25, 1988 and styled United States of America v. Dexter R. Sams, No. 87-5727. The decision affirms the Judgment of the United States District Court for the Eastern District of Kentucky at London. On December 14, 1988, the Petitioner filed a Petition for Rehearing, which was denied on February 6, 1989. The decision of the Sixth Circuit may be found in Appendix, page ... - .... The Petition for Rehearing may be found in Appendix page ... and the Order overruling same on page. .....

STATEMENT OF JURISDICTION

The filing date of the decision of the United States Court of Appeals for the Sixth Circuit of which review is sought in this case is November 25, 1988.

Petition for Rehearing was filed on December 14, 1988. The Order overruling the Petition for Rehearing was entered on February 6, 1989.

Jurisdiction is conferred upon this Court to review by writ of certiorari the appellate decision question by 28 U.S.C. 1254(1).

This Court should grant the writ of certiorari under the authority of Rule 17.1(a) and (c) of this Court.

Rule 17.1(a). The Sixth Circuit has ruled that the six year statute of limitation applicable to the offense of willfully failing to pay the Petitioner's income tax" . . . at the time or times required by law. . . ." does not bar the prosecution of the Petitioner where the indictment was returned on November 19, 1986 (six years and seven months and four days) after he was required to pay his taxes on April 15, 1980.) The Sixth Circuit has erroneously applied and interpreted this Court's decision in *United States* v. *Habig*, 390 U.S. 222, 223, which involved a prosecution for filing "false income tax returns" and as this Court stated for that crime "the offenses involved . . . are committed at the time the return is filed"; hence the statute of limitations would not begin until the fraudulent or false return was filed. As noted in *Habig*, Congress would not have ". . . intended the limitations

period to begin to run before Appellees committed the acts upon which the crimes were based."

The Sixth Circuit has erroneously applied the limitation for filing *fraudulent* or *false* returns to willfully failing to pay a tax ". . . at the time required by law. . . ."

The decision of the Sixth Circuit is in conflict with its own decision in *United States* v. *Ausmus*, 774 F. 2d 722 (1985), where it states that:

> ". . . every United States citizens has an obligation to pay his income tax when it comes due. A taxpayer is obligated to conduct his financial affairs in such a way that he has cash available to satisfy his tax obligations on time. As a general rule, financial inability to pay the tax when it comes due is not a defense to criminal liability for willfully failing to pay income taxes."

and,

> ". . . absent exceptional circumstances mere unavailability of liquid assets, does not excuse criminal liability under 26 U.S.C. Sec. 7203."

The Ninth Circuit in *United States* v. *Andros,* 484 F. 2d 531 (1973), held that the period of limitation begins to run not when the taxes are assessed or when payment is demanded, but rather when the failure to pay the tax becomes willful—an essential element of the crime.

The Sixth Circuit found that 26 U.S.C. 6513 ". . . does not provide the applicable statute of limitations period. . . ." "although "Both Sams (the Petitioner)

and the government assert the statute of limitations for willful failure to pay taxes can be determined, as a matter of law." The Sixth Circuit ruled that ". . . the limitations period begins to run when the taxpayer manifests some act of willful nonpayment.

The indictment here specifically charged that the Petitioner ". . . was required by law on or before April 14, 1980, to pay said income tax . . . and that he did willfully fail to pay the said income tax. . . ." The Sixth Circuit in effect permitted his conviction of willful failure to pay that tax several months after the date set forth in the indictment, in effect sanctioning a variance.

STATEMENT OF THE CASE

Petitioner was indicted on November 19, 1986, on three misdemeanor counts of willfully failing to pay his income taxes for three calendar years. Only Count One of the indictment is at issue in his appeal or in this Petition. Count One provides in pertinent part that:

> "during the calendar year 1979, the defendant . . . had and received taxable income of at least $15,750.00, on which taxable income there was owing to the United States an income tax of $3,496.00; that he was required by law on or before April 15, 1980, to pay said income tax . . . ; and that well-knowing and believing all of the foregoing, he did not willfully fail to pay the said income tax. . . . In violation of Title 26, United States Code, Section 7203."

He was found guilty in all three Counts. He was sentenced to one year on Count One and 10 days on Counts Two and Three to be served concurrently but consequently to Count One.

In connection with Count 1 being barred by the Statute of Limitations, the District Court said:

> "In the case at bar, one issue raised by the Defendant regarding his conviction on Count I was whether the prosecution was barred by the statute of limitations under 26 U.S.C. Sec. 6531. Neither party was able to find a case directly on point as to whether the statute of limitations on a failure to file case begins to run on the date the return was originally due, that is on April 15, 1980, or whether it begins to run from the date the Defendant filed his return, from November 24, 1980. If the April date is the one to be used, then the indictment on Count I is barred by the statute of limitations. On the other hand, if the November date is to be used, then the indictment was timely filed. In the case at bar, the indictment charged in Count I that the Defendant was required by law to pay the income tax on or before April 15, 1980, and the I.R.S. did not grant the Defendant an extension of time within which to file or pay."

I.R.S. Agent, John Brandon, testified:

> "Q. Now, could you tell the Court and jury the date when the tax return was required to be filed?
>
> A. Without extension, it would be required to be filed on April 15th, 1980.

Q. Okay. Am I correct from your testimony that there were no extensions granted for the filing of that return?

A. There are none reflected as having been granted, no, sir.

Q. Now, would you look at your, at the exhibit 7, the transcript . . . * * * would that transcript indicate if any extensions had been granted for the filing of his 1979 taxes?

A. It would indicate the extended due date for the return, had one been granted, yes, sir.

Q. And there is not one there, is there?

A. There is record that one was applied for.

Q. But not granted?

A. That's correct."

[Tr. Vol. 1, Pg. 87, Ln. 6-24]

"Q. Now, I know Mr. Self [Assistant United States Attorney], touched on this, but you are not in any way, I take it, questioning or putting in issue any of the factual statements contained in these returns from '79, '80, and '81?

A. I am not.

Q. You are not saying he's cheated on them, he's lied on them?

A. I am not saying that, no, sir."

[Tr. Vol. I, Pg. 89, Ln. 15-22]

When the United States rested it's case [Tr. Vol. III, Pg. 149, Ln. 21], counsel for the Defendant-Appellant moved for the entry of a verdict of acquittal, stating with regard to Count I:

". . . it's the position of the Defendant that that count is barred by the statute of limitations and should be dismissed."

[Tr. Vol. III, Pg. 150, Ln. 16-17]

The United States' response to the motion was:

". . . concerning the statute of limitations on Count 1, the proof is that the return was filed with —the indictment was returned within six years of when the actual return was filed, and the failure to pay the tax with the return as of that date also constituted and coutinued the offense up to within the six year statute of limitations. Were this a case of where it was a charge of failure to file the return, the return would have been due April the 15th, had there been no extensions. But in this case he is charged with willful failure to pay when the return was filed, and no tax was submitted on the return, Your Honor. The six year statute of limitations began running from that date.

THE COURT: What do you say?

MR. LUNDY: Let me say one more thing, Judge. All the evidence in this case is that he did not have an extension to file his 1979 return, and the indictment charges, not [Tr. No. III, Pg. 151, Ln. 10-25] October or November, 1980, it charges that he was required by law on or before April 15, 1980, to file it.

MR. SELF: That's correct.

MR. LUNDY: Now, six years after that date would be April the 15th, 1986, and this indictment wasn't returned until November 19, 1986.

THE COURT: Well, didn't he actually file it sometime around November of 1980 or something?

MR. SELF: November, November the 25th or 24th or 26th, one day, I think it was filed on the 24th with the district director, November the 24th, 1980, with the district director of the IRS is when it was considered filed, Your Honor. It was received by the Service Center on the 26th of November, of 1980.

MR. LUNDY: I am not aware of any, any statute extending the statute of limitations. If I am required to file it on the 15th, that's when the crime starts on the 15th.

MR. SELF: I would agree with you if there were a failure to file.

MR. LUNDY: If I am required to file it on that day, I am required to pay it on that day. I am not required to pay it whenever I get an extension, an invalid extension, or when I actually do file it. It charges that he was required on April the 15th. It's what the indictment says. Now, the United States is wanting to amend its indictment, in effect. [Tr., Vol. III, Pg. 153, Ln. 1-25]

MR. SELF: I am not amending the indictment. It was due on April the 15th—

MR. LUNDY: That's the effect of what they were doing, Judge.

THE COURT: Well, I am going to overrule the motion at this time. If at a later time the Court — the Court reserves the right to change that ruling. But I am going to overrule the motion on all the grounds. I don't think it's an unconstitutional issue, because the—the Defendant is shown to have a taxable income, in the light most favorable to the

> U.S. with which he could have paid his taxes. And I think in the light most favorable to the U.S., he filed this return at a time which comes within the statutory period of bringing this indictment." [Tr. Vol. III, Pg. 153, Ln. 1-14]

The Sixth Circuit affirmed the judgment of the District Court saying:

> "We hold that the statute of limitations period for willfully failing to pay income taxes cannot be determined by any such general rule. Rather the limitations period begins to run when the taxpayer manifests some act of willful nonpayment."

ARGUMENTS AND REASONS FOR GRANTING THE WRIT OF CERTIORARI

The decision of the Court of Appeals for the Sixth Circuit is not a correct statement of the law. It would appear to abrogate the plain meaning of the language and intention of the applicable statute.

The Petitioner, Dexter Sams, was indicted, 26 U.S.C. Sec. 7203, provides in pertinent part that:

> "Any person required under this title to pay any . . . tax . . . who willfully fails to pay such . . . tax . . . at the time or times required by law or regulations, shall . . . be guilty of a misdemeanor . . ."

The statute of limitations for violations of Section 7203 is set forth in 26 U.S.C. Sec. 6531 which provides in part that:

> "No person shall be prosecuted, tried, or punished for any of the various offenses arising under the

internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years —

* * *

(4) for the offense of willfully failing to pay any tax, or make any return . . . at the time or times required by law or regulations."

* * *

For the purpose of determining the period of limitations on criminal prosecutions, the rules of Section 6513 shall be applicable." [Emphasis added].

The Sixth Circuit has said in effect that the six year statute of limitation mandating that such tax shall be paid ". . . at the time or times required by law. . . ." is not applicable to the offense of willfully failing to pay one's income tax, the knowledge of which should bring great joy to those across the land who are burdened by the payment of income taxes.

The Sixth Circuit has erroneously interpreted this Court's decision in *United States* v. *Habig,* 390 U.S. 222, 223. That case involved a prosecution for cheating or filing "false income tax returns" and as this Court stated in that case ". . . the offenses involved . . . are committed at the time the return is filed"; hence the statute of limitations would not begin until the fraudulent or false return was filed. As noted in *Habig,* Congress would not have ". . . intended the limitations period to begin to run before Appellees committed the acts upon which the crimes were based."

In *United States* v. *Tucker*, 686 F. 2d 230 (1982), the Fifth Circuit, in a prosecution for willful failure to pay income taxes in violation of 26 U.S.C. Sec. 7203, stated:

> "26 U.S.C. Sec. 7203 requires the government to prove that the defendant had a duty to pay income tax, that he failed to pay the tax, and that the failure to pay was willful. Only the willfullness issue was seriously contested below. As used in Sec. 7203, the term 'willful' means a voluntary, intentional violation of a known legal duty. [citations omitted] * * * To act willfully is to act voluntarily, purposefully, deliberately and intentionally, as distinguished from accidentally, inadvertently, or negligently. [citations omitted] * * * A tax payer's good or evil motive is not relevant in determining whether his act was willful under Sec. 7203. [citations omitted] * * * "
>
> " * * * A taxpayer is obligated to conduct his financial affairs in such a way that he has cash available to satisfy his tax obligations on time. As a general rule, financial ability to pay the tax when it comes due is not a prerequisite to criminal liability under Sec. 7203. Otherwise, a recalcitrant taxpayer could simply dissipate his liquid assets at or near the time when his taxes come due and thereby evade criminal liability."
>
> * * *
>
> "Absent exceptional circumstances not present here, we conclude that mere unavailability of liquid assets on the tax due date does not excuse criminal liability under Sec. 7203. We therefore refuse to reverse Tucker's conviction on this ground."

* * *

"Tucker's second argument is that, in order to show willfulness under Sec. 7203, the government must prove that the taxpayer was financially able to pay his tax debt when it came due. Tucker argues that he was unable to pay his taxes when due because his checking accounts had either very low or negative balances, and because he had no other assets available to satisfy the debt. He thus concludes that his failure to pay was not willful. This argument borders on the ridiculous. Every United States citizen has an obligation to pay his income tax when it comes due."

The Sixth Circuit has erroneously applied the limitation for filing *fraudulent* or *false* returns to willfully failing to pay a tax ". . . at the time required by law. . . ."

The decision of the Sixth Circuit is in conflict with its own decision in *United States* v. *Ausmus*, 774 F. 2d 722 (1985), where it states that:

". . . every United States citizens has an obligation to pay his income tax when it comes due. A taxpayer is obligated to conduct his financial affairs in such a way that he has cash available to satisfy his tax obligations on time. As a general rule, financial inability to pay the tax when it comes due is not a defense to criminal liability for willfully failing to pay income taxes."

and,

". . . absent exceptional circumstances mere unavailability of liquid assets, does not excuse criminal liability under 26 U.S.C. Sec. 7203."

The Ninth Circuit in *United States* v. *Andros,* 484 F. 2d 531 (1973), held that the period of limitation begins to run not when the taxes are assessed or when payment is demanded, but rather when the failure to pay the tax becomes willful — an essential element of the crime.

The Sixth Circuit found that 26 U.S.C. 6513 ". . . does not provide the applicable statute of limitations period. . . ." although "Both Sams (the Petitioner) and the government assert the statute if limitations for willful failure to pay taxes can be determined, as a matter of law." The Sixth Circuit ruled that ". . . the limitations period begins to run when the taxpayer manifests some act of willful nonpayment."

The indictment here specifically charged that the Petitioner ". . . was required by law on or before April 14, 1980, to pay said income tax . . . and that he did willfully fail to pay the said income tax. . . ." The Sixth Circuit in effect permitted his conviction of willful failure to pay that tax several months after the date set forth in the indictment, in effect sanctioning a variance.

CONCLUSION

For the foregoing reasons the petitioner respectfully requests this Honorable Court to grant the petition for Writ of Certiorari in this case in order to rectify the misinterpretation and misapplication of the law as stated by the United States Court of Appeals and to settle the conflicting opinions between that Court and other Courts of Appeal which have addressed the question here presented.

Respectfully submitted,

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606-546-4162

Counsel for Petitioner

PROOF OF SERVICE

I, Lowell W. Lundy, counsel for the Petitioner, hereby certify that three copies of the foregoing Petition for Writ of Certiorari were mailed postage prepaid this 30th day of March, 1989, to Solicitor General, Department of Justice, Washington, D.C. 20530; and the United States Attorney, P. O. Box 1490, Lexington, Kentucky 40591.

Lowell W. Lundy

APPENDIX

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

No. 87-5727

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

DEXTER R. SAMS, - - - - *Defendant-Appellant.*

On Appeal from the United States District Court for the Eastern District of Kentucky

---

Filed November 25, 1988

BEFORE: JONES, MILBURN, and BOGGS, Circuit Judges.

JONES, CIRCUIT JUDGE. Defendant-appellant, Dexter R. Sams, appeals his jury conviction for willfully failing to pay income taxes. For the reasons set forth below, we affirm.

I.

Sams was indicted on November 19, 1986 on three misdemeanor counts of willfully failing to pay his income taxes for three calendar years. Only Count One of the indictment is at issue in this appeal. Count One provides in pertinent part that

> during the calendar year 1979, the defendant . . . had and received taxable income of at least $15,750.00, on which taxable income there was owing to the United States an income tax of $3,496.00; that he was required by law on or before April 15, 1980, to pay said income

> tax . . .; and that well-knowing and believing all of the foregoing, he did willfully fail to pay the said income tax . . . . In violation of Title 26, United States Code, Section 7203.

J. App. at 5. Sams was arraigned on December 15, 1986 at which time he pled not guilty to all three counts of indictment.

Sams filed his 1979 return with the Internal Revenue Service ("IRS") on November 24, 1980. No taxes were remitted with the return and a letter from Sams's accountant was attached to the return which stated that "[t]axpayer reports that he is short of funds. He assures us that he will make arrangements to pay." Tr., Vol. I at 37. No such arrangements were ever made and Sams had not paid the taxes owed for 1979 at the time of his March 1987 trial.

Sams's jury trial began on March 18, 1987. At the close of the government's case, Sams moved for a directed verdict of acquittal. He argued that the indictment as to Count One was barred by the six-year statute of limitations applicable for violations of Section 7203. Sams specifically argued that since the IRS had not granted him an extension to pay his 1979 taxes, the statute of limitations began to run on April 15, 1980 - the day the 1979 taxes were due. Since the indictment was not returned until November of 1986, Sams contended that the indictment was barred. In response to Sams's motion, the government argued that the statute of limitations for a charge of willful failure to pay taxes begins to run when the tax return is filed, not when the taxes are due. Since Sams's 1979 was filed on November 24, 1980, the Government contended that the November 19, 1986 indictment was within the six-year limitations period provided in 25 U.S.C. § 6531 (1982). The trial court accepted the government's position and denied Sams's motion for a directed verdict.

On May 21, 1987, the jury found Sams guilty on all three counts of the indictment. Sams subsequently filed a timely notice of appeal. The only issue before this court is whether the statute of limitations for willfully failing to pay federal income taxes begins to run on the date the tax return is due to be filed or on the date the tax return is actually filed.

II.

The statute under which Sams was indicted, 26 U.S.C. § 7203, provides in pertinent part that:

> Any person required under this title to pay any . . . tax . . . who willfully fails to pay such . . . tax . . . at the time or times required by law or regulations, shall . . . be guilty of a misdemeanor . . . .

The statute of limitations for violations of section 7203 is set forth in 26 U.S.C. § 6531 which provides in part that

> No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years -
>
> . . . .
>
> (4) for the offense of willfully failing to pay any tax, or make any return . . . at the time or times requried by law or regulations.
>
> . . . .
>
> *For the purpose of determining the period of limitations on criminal prosecutions, the rules of section 6513 shall be applicable.*

(emphasis added).

Relying on the above-emphasized language, Sams argues that the rules of section 6513 governs the applicable period of limitations in this case. Section 6513 provides in part that "the last day prescribed for filing the return or paying the tax shall be determined without regard to any extension of time granted the taxpayer." 26 U.S.C. § 6513(a) (1982). However, in *United States v. Habig*, 390 U.S. 222, 225 (1968), the Supreme Court held that section 6513(a) is applicable only in situations where "a return is filed or a tax is paid before the statutory deadline." The Court specifically noted that "[t]here is no reason to believe that § 6513, by reference to the 'rules of section 6513' expands the effect and operation of the latter beyond its own terms so as to make it applicable to situations other than those involving early filing or advance payment." *Id.*

In the present action, since Sams neither paid his taxes in advance nor filed an early return, section 6513 is not applicable.

III.

Having determined that section 6513 does not provide the applicable statute of limitations period, we now consider what constitutes the appropriate "starting date" for the statute of limitations under section 6513. Both Sams and the government assert that the statute of limitations for willful failure to pay taxes can be determined, as a matter of law. Sams contends that, as a matter of law, the statute begins to run on the date the tax return is due to be filed. The Government, on the other hand, argues that the statute begins to run when the tax return is actually filed. We reject both of these arguments.

In general, criminal statutes of limitations begin to run when the crime is complete, i.e., when every element of the crime has been committed. *See Toussie v. United States*, 397 U.S. 112, 115 (1970). In the instant action, the trial

court instructed the jury that in order to convict Sams, the Government had to show that Sams had a duty to pay taxes, that he failed to pay his taxes, and that his failure to pay was willful. The court noted that since Sams filed his tax returns every year, the key issue was whether Sams "willfully" failed to pay the taxes owed.

The determination of when willfulness manifests itself is a factual issue which must be determined by the jury. *United States v. Hook*, 781 F.2d 1166, 1170-73 (6th Cir.), *cert. denied*, 479 U.S. 882 (1986). In addition, we agree with the conclusion reached by the Ninth Circuit that since "willfulness is an essential element" of this crime, the statute of limitations "begins to run not when the taxes are assessed or when payment is demanded, but rather when the failure to pay the tax becomes wilful . . . ." *United States v. Andros*, 484 F.2d 531, 532 (9th Cir. 1973) (citations omitted). We hold that the statute of limitations period for willfully failing to pay income taxes cannot be determined by any such general rule. Rather, the limitations period begins to run when the taxpayer manifests some act of willful nonpayment.

In this case, the trial court specifically instructed the jury that it was their responsibility to determine Sams's "intent" to pay the taxes which he owed the IRS. Since Sams attached a note to his 1979 tax return which asserted that, as of November 24, 1980, he intended to "make arrangements to pay" the taxes owed, the jury could reasonably have determined that Sams's "willfulness" not to pay the taxes owed did not occur until at least November 24, 1980. Sams did not object at trial to the jury instructions given by the district court. Thus, the issue of whether the court *should* have instructed the jury to specify the date on which Sams's failure to pay taxes became willful is not before us. Fed. R. Crim. P. 30. In our view, the jury instructions neither contain "plain errors" nor misstate the law.

Fed. R. Crim. P. 52(a). *See United States v. Glover*, 846 F.2d 339, 344 (6th Cir. 1988). Therefore, since the jury could have concluded that Sams committed every element of the crime of willfully failure to pay income taxes within the six years prior to the date of the indictment, we hold that the statute of limitations was not a bar to the first count of Sams's indictment.

IV.

For the reasons stated above, the defendant's conviction is hereby AFFIRMED.

No. 87-5727

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DEXTER R. SAMS, - - - - *Defendant-Appellant Petitioner,*

v.

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee Respondent.*

PETITION FOR REHEARING

TO: The Honorable Judges of the
United States Court of Appeals
For the Sixth Circuit

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the Appellant herein Petitions for a rehearing and would show to this Court the following facts:

1. On November 25, 1988, this Court affirmed the Judgment of the Court below where the charge was that Appellant had willfully failed ". . . as he was required by law on or before April 15, 1980, to pay . . . [his] income tax to the Director, Internal Revenue Service . . . and . . . he did willfully fail to pay the said tax . . . . In violation of Title 26, United States Code, Section 7203."

The indictment was not returned until November 19, 1986, or more than six (6) years after the indictment charged the tax was due.

On November 25, 1988, this Court affirmed the judgment of the Court below, reasoning that although 26 U.S.C. Sec. 6531 provides:

> ". . . that the period of limitations shall be six (6) years
> --- . . . .
>
> (4) for the offense of willfully failing to pay any tax . . . at the time or times required by law or regulation."

this court decided that ". . . the limitations period begins to run when the taxpayer manifests some act of willful nonpayment."

In its opinion this Court relied on *United States v. Habig,* 390 US 222, 225, which stated that 26 U.S.C. Sec. 6513(a) is applicable only in situations where "a return is filed or a tax is paid before the statutory deadline."

The Appellant would respectfully suggest to this Court that *Habig* was "indicted for crimes relating to allegedly false income tax returns", and not willful failure to pay his taxes.

There the Supreme Court said:

> "Section 6531 limits the time when indictments may be filed for the charged offenses to six years 'next after the commission of the offense.'
>
> "The offenses involved in Counts 4 and 6 [filing false income tax returns] are committed at the time the return is filed. [Cases cited] Six years had not quite elapsed from the commission of the crimes in the present case to the filing of the indictment. * * * But because of Section 6513(1) of the Code, they say the critical date here is not the date when the returns were actually filed but the date when they were initially due to be filed, viz., May 15, and not August 15, 1960."

The Supreme Court then stated that the Appellee [Habig's] contention:

> ". . . is necessarily based on the surprising assertion that Congress intended the limitations period to being to run before Appellees committed the acts upon which the crimes are based", e.g.,

filing false income tax returns.

That reasoning is not applicable to this case. Here it was a failure to pay. In *Habig* it was the act of filing fraudulent, false returns.

The Appellant respectfully suggests to this Court that the facts and reasoning in *Habig* is not applicable to this case.

This Court, in citing *United States* v. *Andros,* 484 F.2d 531, 532 (9th Cir., 1973), stated ". . . we agree with the conclusion reached by the Ninth Circuit that since 'willfulness is an essential element' of this crime, the statute of limitations' begins to run not when the taxes are assessed or when payment is demanded, but rather when the failure to pay the tax became willful . . ."

This Appellant would call the Court's attention to its decision in *United States* v. *Ausmus,* 774 F.2d 772, 725 (6th Cir., 1985) where this Court stated:

> "We adopt the rationale of the *Tucker* court and reject the language in *Andros* and *Goodman.* Otherwise, a recalcitrant taxpayer could spend his money as fast as he earns it and evade criminal liability while not paying taxes as long as his bank balance is zero when the taxpayer's taxes are due. We note that the Ninth Circuit appears to have retreated from its dicta in *Andros.* In this case, defendant admitted that he spent money on luxuries including entertainment, new clothes, and support for his fiancee. Futhermore, the United States

introduced evidence that defendant earned sufficient disposable income in the respective years so that defendant could have paid his taxes. Defendant, however, chose to spend his disposable income on other things. Even if defendant did not waive his objection to the challenged instruction, the District Court did not err in giving the instruction."

With regard to *United States* v. *Tucker*, 686 F.2d 230, (5th Cir.), Cert. denied, 459 U.S. 1071, this Court said in *Ausmus*, supra:

"In Tucker, the appellant regularly filed his income tax returns but consistently failed to pay the disclosed tax liability. Tucker, however, spent considerable sums of money on luxuries including two trips to the Virgin Islands, a trip to Guadalajara, Mexico, jewelry, a new pleasure boat, a new car for his son, and club dues. Tucker also made payments totaling more than $2,000 to a woman he was dating. The court stated that Tucker's defense that he did not have the liquid assets to pay his taxes 'borders on the ridiculous'. Id. The court concluded that, absent exceptional circumstances, mere unavailability of liquid assets does not excuse criminal liability under 26 USC Sec. 7203."

The same Court tried J. C. Ausmus and Dexter R. Sams; and relying on this Court's approval of the instructions used in *Ausmus*, Judge Siler used the same instructions in Dexter R. Sams' case.

In *Ausmus*, this Court said:

"However, every United States citizen has an obligation to pay his income tax when it comes due. A taxpayer is obligated to conduct his financial affairs in such a way that he has cash available to satisfy his tax obligations on time. As a general rule, financial in-

ability to pay the tax when it comes due is not a defense to criminal liability for willfully failing to pay income taxes."

During the trail, Judge Siler instructed the jury:

"The defendant asserts that his failure to pay his taxes for the years 1979, 1980 and 1981 was not willful because in view of all of his financial circumstances he did not have enough money to pay them. However, every United States citizen has an obligation to pay his income tax *when it becomes due.* A taxpayer is obligated to conduct his financial affairs in such a way that he has cash available to satisfy his tax obligations on time, absent exceptional circumstances. As a general rule, financial inability to pay the tax when it becomes due is not a defense to criminal liability for willfully failing to pay income taxes." (Underscoring supplied) [Tr., Vol. IV, Pg. 58, Ln. 8-18]

Finally the Appellant asks the Court to consider that the indictment specifically states that the Defendant ". . . was required by law on or before April 15, 1980, to pay said . . . tax" and April 15, 1980, was the "last day prescribed for filing the return" as required by 26 U.S.C. 6513.

For the foregoing reasons the Petitioner-Appellant respectfully requests that this court grant the Petition for Rehearing and that the Judgment of the District Court be, upon further consideration, reversed as to Count I of the indictment.

Lowell W. Lundy
P. O. Box 380
Barbourville, Kentucky 40906
Attorney for Petitioner-
Appellant, Dexter Sams
606-546-4162

I hereby certify that I have examined the foregoing Petition and that in my opinion it is well founded and entitled to favorable consideration of the Court and that it is not filed for purposes of delay.

Lowell W. Lundy

CERTIFICATE

I hereby certify that I have this the 14th day of December, 1988, mailed a true copy of the foregoing Petition for Rehearing to Hon. Louis DeFalaise, United States Attorney, P. O. Box 1490, Lexington, Kentucky 40591.

No. 87-5727

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER — Filed February 6, 1989

DEXTER R. SAMS, - - - *Defendant-Appellant,*

v.

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee.*

BEFORE: JONES, MILBURN and BOGGS, Circuit Judges.

Dexter R. Sams has petitioned the Court to rehear its decision of November 25, 1988 affirming the judgment of the district court.

The Court has considered the petition for rehearing offered in support thereof. Finding no issue of law or fact that was overlooked or misapprehended, the petition is found not to be well-taken.

It is therefore, ORDERED that the petition for rehearing is denied.

Entered By Order Of The Court

(s)

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Clerk